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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1405

DEMOCRATIC NATIONAL COMMITTEE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, and
UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is not yet reported. The opinion and order of the Federal Communications Commission (Pet. App. 43a-55a) is reported at 31 F.C.C. 2d 708.

JURISDICTION

The judgment of the court of appeals affirming the Commission's decision was entered on February 2,

1972. The petition for a writ of certiorari was filed on April 28, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court below erred in holding that the Federal Communications Commission acted within its discretion by refusing, in the context of this case, to promulgate a new rule granting automatic equal response time to the opposition party for any broadcast appearance by the President as elected leader of the Nation.

2. Whether the court below erred in concluding that the Commission reasonably requires complaints in fairness cases to contain more than vague and general allegations of unfairness and that, under this standard, a complaint made by the Republican National Committee did not justify ordering ABC to produce programming documents and logs.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the Constitution of the United States and the perinent provisions of the Communications Act of 1934 are set forth in the petition for a writ of certiorari.

STATEMENT

On April 13 and 14, 1971, the Democratic National Committee (DNC) filed four separate complaints with the Commission against the three major television net-

works. DNC claimed that the networks had unreasonably refused to accede to its demands for free, equal time to respond to three specified broadcast appearances by President Nixon.

The first of the Presidential appearances at issue occurred on March 15, 1971, when NBC's Barbara Walters conducted a 48-minute interview with the President on the network's "Today" show. While the President gave his opinion on several public issues, the major portion of the interview dealt with his career and family life. On March 22, 1971, ABC aired a one-hour interview of the President by Howard K. Smith of the network staff; while the discussion focused principally on the war in Indo-China, election reform and revenue sharing were also mentioned. On April 7, 1971, all three networks simultaneously carried a Presidential address on the administration's programs and policies in Southeast Asia. (Pet. App. 4a-6a.)

CBS and NBC denied DNC's demands to reply to the latter address, but ABC provided one-half hour of free prime time for a response, which DNC utilized by broadcasting its program, "Indo-China: Another View," on April 22, 1971. However, ABC refused a request for equal time with respect to the March 22 interview with the President, and NBC refused to provide time for a DNC response to the "Today" show appearance by the President. (Pet. App. 5a-6a.)

In its complaints before the Commission, DNC argued that the Commission's ruling in *Letter to Nicholas Zapple*, 23 F.C.C. 2d 707, applied to the broad-

casts in question. In *Zapple*, the Commission ruled that if a licensee sells time to one political party, it would be unreasonable to refuse to sell comparable time to the rival party. In the alternative, DNC maintained that "fairness" requires the networks to provide DNC with the time it demanded even if *Zapple* is not applicable.

The networks replied that the *Zapple* ruling is inapplicable and that the Commission's Fairness Doctrine merely requires broadcasters to provide a reasonable opportunity for the airing of views contrasting with those of the President and does not provide DNC with an automatic right to equal time to respond to any particular Presidential address. Each network asserted that it had complied with this Fairness Doctrine obligation with respect to the views expressed in the broadcasts and specifically indicated past actions and future plans with respect to the presentation of contrasting views. DNC then responded that, if the Fairness Doctrine is to be applied to Presidential broadcasts, an evidentiary hearing should be held to test the networks' assertions that Fairness Doctrine requirements have been satisfied. (Pet. App. 46a-50a.)

The Commission rejected DNC's claims, concluding that *Zapple* does not apply to broadcasts by the President as leader of the Nation, that the public interest does not require that the Commission adopt a new rule affording the opposition party an automatic right to respond to such broadcasts, and that DNC had not presented any substantial question of the networks'

compliance with the Fairness Doctrine that would require an evidentiary hearing. (Pet. App. 50a-55a.)

The Commission also denied the requests of the Republican National Committee (RNC), which had filed a complaint against ABC seeking broadcast time to respond to DNC's program of April 22 and an order that ABC be required to produce certain documents for inspection by RNC in the same proceeding (Pet. App. 51a-55a).

On petitions for review of the Commission's decision, the court of appeals affirmed. The court concluded that the Commission's policy with respect to Presidential broadcasts (Pet. App. 14a-28a) and certain procedural policies (Pet. App. 29a-40a) are reasonable exercises of agency discretion and do not violate the First Amendment, as DNC had claimed. In addition, the court held that the Commission had not been "arbitrary, whimsical or capricious" in the application of its policies and procedures in the instant case (Pet. App. 40a-41a).

ARGUMENT

The petition presents no question warranting review by this Court.[1] The court below merely upheld as reasonable certain established policies of the Com-

[1] The issues presented here are unrelated to the question of paid access to the broadcast forum for public issue "spot" announcements—the question presented in *Federal Communication Commission and United States* v. *Business Executives Move for Vietnam Peace and Democratic National Committee, et al.*, Nos. 71-863, 71-864, 71-865, 71-866.

mission with respect to fair coverage of controversial public issues, and determined that those policies had been rationally applied in this case. Finding no abuse of discretion, the court properly refused to substitute its judgment for that of the Commission with respect to the best policy to follow. *National Broadcasting Co.* v. *United States*, 319 U.S. 190; *Federal Communications Commission* v. *Schreiber*, 381 U.S. 279.

1. The Commission's Fairness Doctrine, as approved by Congress, 47 U.S.C. 315(a), and as sustained by this Court in *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 386-392, generally requires licensees to present contrasting views on issues of public importance in order to serve the public's First Amendment interest in broadcasting. The Commission requires licensees to comply with the Fairness Doctrine in their treatment of controversial issues discussed by the President in his appearances on the air. *Letter to Republican National Committee*, 40 F.C.C. 625; *Letter to Blair Clark*, 11 F.C.C. 2d 511; *Committee for the Fair Broadcasting of Controversial Issues* (*Fair Committee*), 25 F.C.C. 2d 283, 294. Thus if the licensee allows the President to broadcast his views on public issues, reasonable opportunity must be afforded for the airing of significant opinions in opposition to his views.

DNC's argument against the Commission's policies in this respect is simply that whenever the President makes a broadcast appearance the public's right to receive contrasting viewpoints would be better served by providing the opposition party with free equal

response time instead of requiring licensees to present contrasting views in a format of the licensee's choosing. DNC asserts that the Commission's failure to adopt this suggested departure from the policy approved in Section 315 and *Red Lion* violates the First Amendment and the Communications Act.

DNC has offered only one reason for departing from the Fairness Doctrine in this area. DNC asserts that because of the importance of his office, only the President's voice will be heard if contrasting views are presented in formats of the licensee's choosing and therefore the public's interest in receiving contrasting viewpoints can be effectively satisfied only if DNC is provided with unfettered use of broadcast time to present contrasting viewpoints in the format of its choice.

The Commission's judgment that the continued application of the Fairness Doctrine to issues discussed in Presidential broadcasts better serves the public's First Amendment interest than would the adoption of DNC's suggested rule is based on a rational interpretation of the public interest. Treatment of such issues under the Fairness Doctrine, as the court below observed (Pet. App. 24a-25a, n. 10), serves "robust wide-open debate" and the goal of an informed electorate by allowing and encouraging "the discussion and presentation of controversial issues in various broadcast formats (*e.g.*, newscasts, interviews, documentaries)." *Fair Committee, supra,* 25 F.C.C. 2d at 292. Conversely, DNC's proposal of equal response time would tend to confine the discussion to

one format. Moreover, the court of appeals noted that some "groups are far more qualified to speak" than DNC on many issues discussed by the President (Pet. App. 36a). The opposition party is not always the principal source of opposition to—and may even agree with—a particular policy or viewpoint advocated by a President.

The court below also found that DNC's theory that only the President's voice is being heard is unfounded. The court stated (Pet. App. 36a-37a):

> Daily all of the media—not merely broadcast media—carry stories, articles and reports by opponents to the President, from the opposition party as well as his own party. * * * Information indicative of all viewpoints is available merely for the seeking.

Based on its unsupported theory, DNC has argued that the Commission violated the Communications Act, which requires broadcasters to provide equal time with respect to candidates for public office. 47 U.S.C. 315. But the Commission has merely adhered to the congressionally approved, flexible approach of the Fairness Doctrine, rather than a general policy of equal time for specified individuals who may not always contribute to an informed electorate. Since DNC presented no "compelling indications" that this was an incorrect interpretation of the Communications Act, the court below properly affirmed the Commission's decision.[2] *Red Lion, supra*, 395 U.S. at 381;

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[2] DNC points out that the Commission has developed corollaries to the Fairness Doctrine in the past, but this does not

Udall v. *Tallman*, 380 U.S. 1, 16-17.

Finally, the record in this case belies DNC's assertion that the Fairness Doctrine's goal of an informed electorate has not been met with respect to Presidential appearances. In this case, the networks complied with the Fairness Doctrine and, in doing so, broadcast the views of DNC and its spokesmen, as well as others. Each of the networks indicated that substantial amounts of news, discussion, commentary and interview programs had been devoted to views opposing the President's, including those of several leading Democratic Senators and Representatives. In addition, ABC and NBC provided or scheduled free time for the specific use of DNC to air its views on public issues.

Thus, the court below properly held that the Commission's policy properly promotes First Amendment interests, that the Commission has followed a reasonable interpretation of the public interest standard of the Act, and that the Commission rationally applied its policy in this case.[3]

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advance its argument that the Commission has acted arbitrarily in this case. It merely demonstrates that the Commission may develop reasonable ancillary policies in the public interest. To this end, the Commission has instituted an in-depth study of the Fairness Doctrine to determine whether revisions to existing policies or new policies could appropriately be adopted to further the goal of robust debate on public issues. *Notice of Inquiry in Docket 19260*, 30 F.C.C. 2d 26.

[3] DNC suggests that the court below refused to require the Commission to adopt DNC's proposed rule because the court feared that this would cause the President to restrict his use

2. DNC also contends that the Commission should adopt different procedures for processing Fairness Doctrine complaints.

The Commission receives a great number and variety of complaints that, in diverse ways, question some broadcaster's compliance with the Fairness Doctrine.[4] The basic procedures for dealing with these complaints are described at 29 Fed. Reg. 10415, 10416. The complainant is expected "to submit specific information indicating (1) the particular station involved; (2) the particular issue of a controversial nature discussed over the air; (3) the date and time when the program was carried; (4) the basis for the claim that the station has presented only one side of the question; and (5) whether the station has afforded, or has plans to afford an opportunity for the presentation of contrasting viewpoints." *Id.* If the complaint indicates that further inquiry is warranted the Commission will request the licensee's comments. It may then dispose of the matter on the basis of the submission or may require additional information from the licensee.

DNC urged in its complaint that if the Fairness Doctrine, instead of an automatic right of response

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of television (Pet. 14-15). But DNC had the burden to show that the Commission's policy was irrational; and the court had no obligation to show that DNC's proposal was unfeasible. Moreover, as explained above, the Commission had other sound reasons for rejecting the proposed rule.

[4] The Commission received 1736 complaints alleging fairness doctrine violations in fiscal 1970. 36th Annual Report, p. 62.

by the opposition party, is to be applied to issues discussed in Presidential broadcasts, then the Commission should conduct a full-scale evidentiary hearing to determine how much time each network devoted to presenting views supporting or opposing the President on each issue discussed, the format in which the views were presented, the manner in which opposition spokesmen were selected, the impact of Presidential and other appearances on viewers, and other questions that DNC considered relevant to the inquiry (Pet. App. 38a-39a).

DNC's petition indicates that it is no longer contending that the Commission erred in denying its own request for an evidentiary hearing. Instead it asks this Court to consider whether the Commission erred in denying the Republican National Committee's request that the American Broadcasting Company be compelled to produce certain documents and to consider whether the Commission's general requirement that fairness complainants present "detailed and specific evidence of failure to comply with the requirements" of the Fairness Doctrine imposes an excessive burden on fairness complainants generally.[5] The petition does not indicate how either ruling af-

[5] DNC did not claim before the Commission that the specific evidence requirement imposed an unreasonable "burden of proof." While reaching the merits of this contention, the court below first properly ruled that the claim was procedurally defective under 47 U.S.C. 405, which precludes a reviewing court from considering an argument not made before the Commission. *Hansen* v. *Federal Communications Commission*, 413 F.2d 374 (C.A.D.C.).

fected DNC's ability to present any Fairness Doctrine complaint it may have had. However, even if it is assumed that this case does "present" those questions, DNC's contentions do not warrant the Court's consideration.

The ruling on the RNC request represents a reasonable application of the Commission's policy of tailoring the scope of the fairness inquiry to the nature of the complaint. RNC questioned whether ABC had taken non-news programming into consideration in concluding that its presentation of views on the Vietnam war was balanced and requested documents for the purpose of determining the accuracy of ABC's position. The Fairness Doctrine does not require mathematical balance; it requires that a licensee provide reasonable opportunities for the presentation of contrasting views. RNC did not allege that ABC had failed to present contrasting views; other documents submitted to the Commission demonstrated that ABC had done so. The Commission concluded that there was no reason to require production of documents in those circumstances and the court of appeals, in affirming the Commission's decision, stated that it was "at a loss" to find any reason why ABC should be compelled to do so (Pet. App. 31a).

DNC incorrectly asserts that the Commission's policy of requiring complainants to produce specific evidence of noncompliance with the Fairness Doctrine frustrates First Amendment interests. That policy stems from the Commission's commitment to foster wide-open debate on public issues. To this end, the

Commission encourages licensees to editorialize and requires that they cover significant opinions on public issues in a fair manner. This duty is part of the licensees' obligation to act in the public interest, a condition of a license to broadcast, and good faith compliance is consequently required. With these considerations in mind, the Commission has refused to require licensees to engage in laborious searches and collections of documents to prove their adherence to the doctrine when a complainant has done nothing more than allege general unfairness. *Robert G. Ryan*, 25 F.C.C. 2d 884, 885; *Allen C. Phelps*, 21 F.C.C. 2d 12, 13; *Applicability of Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 F.C.C. 598, 600, 29 Fed. Reg. 10415, 10416. Such time-consuming searches would deter proper handling of day-to-day broadcast operations and would not be conducive to uninhibited debate. Consequently, the Commission has reasonably required specific evidence of unfairness from a complainant before it will consider ordering broadcasters to produce documented proof of fair coverage. *Hale* v. *Federal Communications Commission*, 425 F.2d 556, 559 (C.A.D.C.); cf. *Healey* v. *Federal Communications Commission*, No. 24,630, C.A.D.C., decided March 3, 1972, slip op. p. 9.

DNC's assumption that the specific evidence requirement is an onerous burden for complainants with a *bona fide* complaint is unfounded. DNC may be troubled that establishing the degree of balance on issues that do receive substantial coverage would

be difficult, but, as previously noted, the Fairness Doctrine does not require mathematical balance. Extensive monitoring would not be required to present a specific complaint that will enable the licensee to respond to it.

The Fairness Doctrine procedure presents no absolute bar to requiring broadcasters to produce program documentation. The Commission's rulings on the type of evidence that will necessitate production of programming documents are necessarily based upon the nature of the complaint in the particular case. *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 F.C.C. at 599-600, 29 Fed. Reg. at 10416.

Moreover, the processing of *ad hoc* fairness complaints received between license renewals is not the only, or the principal, means of assuring licensee compliance with the Fairness Doctrine and other public interest requirements. More extensive evaluation of the licensee's performance occurs in determining whether a license should be renewed.[6]

In sum, DNC seeks review of the decision below in the hope that this Court will substitute the policies

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[6] If a substantial question of compliance with the Fairness Doctrine exists at the time of a renewal application, public participation and an evidentiary hearing may be required. *Office of Communication of the United Church of Christ* v. *Federal Communications Commission*, 359 F.2d 994 (C.A. D.C.). The renewal applicant has the burden of proof in establishing that renewal of the license will be in the public interest. *Office of Communication of the United Church of Christ* v. *Federal Communications Commission*, 425 F.2d 543 (C.A.D.C.).

of DNC for those of the Commission. However, as the court below held, the Commission's policies are neither unreasonable nor in contravention of statutory purpose or constitutional command. Accordingly, the Commission's exercise of its responsibilities here was correctly upheld. *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 224.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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